

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 09-50026

In the Matter of:

GENERAL MOTORS CORPORATION,

Debtor.

United States Bankruptcy Court
One Bowling Green
New York, New York

July 7, 2009

7:08 PM

B E F O R E:

HON. ROBERT E. GERBER
U.S. BANKRUPTCY JUDGE

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2 HEARING re Motion to Allow Direct Appeal to Second Circuit.

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24 (TELEPHONICALLY)

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P R O C E E D I N G S

2

THE COURT: Hello. This is Robert Gerber, may I get
appearances on the phone, please.

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5

MR. JAKUBOWSKI: Your Honor, this is Steve Jakubowski
for the individual accident victims.

6

THE COURT: Okay. Good evening, Mr. Jakubowski.

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MR. D'APICE: Good evening, Your Honor. Peter D'Apice
for the ad hoc committee of asbestos personal injury claimants.

9

THE COURT: Okay. That's pronounced D'Apice?

10

MR. D'APICE: Yes, sir.

11

12

THE COURT: Okay. And you're Mr. Esserman's
colleague -- partner?

13

MR. D'APICE: Yes, Your Honor.

14

THE COURT: Thank you.

15

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MR. REINSEL: Good evening, Your Honor. Ron Reinsel
from Caplin & Drysdale on behalf of Mark Buttita and joined
with the ad hoc committee.

18

THE COURT: Right. Mr. Reinsel.

19

20

MR. MILLER: Harvey Miller for the debtors, Your
Honor, of Weil Gotshal & Manges.

21

THE COURT: Okay. Mr. Miller. Anyone else?

22

23

MR. MAYER: Tom Mayer from Kramer Levin for the
Official Committee of Unsecured Creditors.

24

THE COURT: Right. Mr. Mayer.

25

MR. BONOMO(ph.): Lawrence Bonomo, General Motors

1 legal staff.

2 THE COURT: That one I couldn't hear.

3 MR. BONOMO: Lawrence Bonomo, General Motors legal
4 staff.

5 THE COURT: Bonomo?

6 MR. BONOMO: Yes.

7 THE COURT: And who do you represent, Mr. Bonomo?

8 MR. BONOMO: The General Motors legal staff.

9 THE COURT: Oh, okay.

10 MR. BRESSLER: Barry Bressler, Your Honor, for the ad
11 hoc committee.

12 THE COURT: Sure, Mr. Bressler.

13 MR. BRESSLER: Thank you, Your Honor.

14 THE COURT: Get everybody now?

15 MR. RAPISARDI: John Rapisardi.

16 THE COURT: Whoever just -- oh, Mr. Rapisardi?

17 MR. RAPISARDI: Yes.

18 THE COURT: Mr. Rapisardi, I don't know how much
19 you're going to be speaking but you're very soft. If you do
20 decide you're going to speak, I'm not sure if Mr. Schwartz is
21 going to let you, he's nodding negatively in the courtroom, but
22 if you change your mind and speak you're going to have to speak
23 louder.

24 MR. RAPISARDI: I will, Your Honor. Thank you.

25 THE COURT: Okay. All right. Do I now have

1 everybody?

2 UNIDENTIFIED ATTORNEY: Your Honor, is the U.S.
3 Attorney there?

4 THE COURT: Yes, I'll now ask for appearances in the
5 courtroom. And for those, Mr. Schwartz, Mr. Jones, I'm going
6 to need you to come to the main lectern so people on the phone
7 can hear you better. Mr. Schein -- and forgive me, with you,
8 Mr. Schein?

9 MR. SCHEIN: Is my associate, Erin Zavalkoff.

10 THE COURT: Okay. Thank you. Mr. Schein is here for
11 the Canadian folks, Export Canada. Okay. Mr. Jakubowski, this
12 is your motion, you can proceed. I've read everybody's papers.

13 MR. JAKUBOWSKI: Okay. I won't belabor the point,
14 Your Honor. I think both sides have stated their positions as
15 best as possible. I just want to make a few points, really in
16 rebuttal to the arguments that were presented by the debtor and
17 Treasury.

18 First, with respect to the issue of whether or not a
19 controlling decision has been issued, I point Your Honor to
20 your own papers and the caption to your opinion is the decision
21 and the caption to your order is an order. And as I read the
22 statute, it talks about a controlling decision. So I think
23 that, as you, yourself, stated, it's not clear exactly what the
24 rationale is going to be for the bottom line holding but you
25 felt compelled to rule as you did because of the bottom line

1 holding. And I think that, in this case, absent a decision and
2 a rationale, I think it's fair to find that the request for
3 relief falls within the first part of 158(d)(2)(A)(i) in the
4 sense that there is no true controlling decision, just a
5 judgment and bottom line.

6 Second, with respect to the issue of public
7 importance, I guess maybe everything is relative but to me,
8 Your Honor, when you're dealing with a half a billion dollars
9 estimated of tort claimant liability that's reserved on the
10 balance sheet based on extensive review and analysis of what's
11 observed by one of the best insurance consulting companies in
12 the world, when you're talking about 1,000 cases that are
13 pending, a significant number of other injuries that are
14 reported but not yet resolved or are subject to litigation.
15 You're talking about people who have gone through some type of
16 a trauma that ultimate is in many ways a life changing event.
17 And if anyone needs the assistance and to have this case
18 progress it's those people because they are the least likely to
19 be able to defend themselves and they need speed and resolution
20 as quickly as possible.

21 THE COURT: Well pause please, Mr. Jakubowski.
22 Believe me, I understand how important it is to a tort litigant
23 but assuming I were to agree with everything you're saying, all
24 of these folks would still have to prove their tort claims in
25 whatever courts they're pending in order to recover and that

1 would be on a one-by-one basis anyway, wouldn't it?

2 MR. JAKUBOWSKI: Absolutely. But what this would do,
3 Your Honor, is -- and let me just merge really two issues, one
4 is public importance which I've talked about but also the
5 second prong of this, which is a -- and that is advancing the
6 progress of the case.

7 By providing an intermediate level of appeal here, you
8 will have effectively -- failure to grant the motion will
9 have -- will ultimately result in another year plus worth of
10 delay for people who are in the middle of litigation and, as
11 you well know, memories fade, evidence recedes, lawyers are at
12 different stages of development. They change, they move,
13 experts come and go and move different places and just the
14 general momentum of all these cases grinds to a halt. And to
15 have it grind to a halt for a full year while they're waiting
16 for the District Court to issue what is really in effect a
17 relatively meaningless opinion here because of the fact that
18 you came forward with a very coherent opinion that can be
19 resolved as a matter of law, I think is unfair to them and I
20 think does not make to a materially advance the progress of
21 that case.

22 THE COURT: Mr. Jakubowski, when you were making your
23 last point it sounded to me like the arguments that are
24 sometimes made to bankruptcy judges on behalf of tort litigants
25 to give me relief from the stay so I can liquidate my claim so

1 that the folks who saw the car wreck don't scatter to the winds
2 and so forth. I think that's something as to which -- well, I
3 like to think I keep an open mind on everything but most judges
4 would keep an open mind on. But getting the ability to
5 liquidate claims is a little different than determining who
6 the -- whether you can go against New GM.

7 Is it your point that they couldn't do that because
8 they don't know whether New GM would be bound by a defense by
9 Old GM?

10 MR. JAKUBOWSKI: Well, I think what I'm saying, Your
11 Honor, is that for the tort litigants to proceed, let's say
12 there to say well let's go lift the stay, let's proceed in
13 State Court, in a way what's the point? They would be
14 litigating for a recovery of what, ten cents on the dollar I
15 think is what's projected.

16 Absent the ability to join New GM as a defendant in
17 their respective cases, there's really no incentive for them to
18 proceed forward and they as well just liquidate their claim at
19 some type of mediation, I think, that's proposed by the debtor
20 and the creditors' committee in connection with the bankruptcy
21 case.

22 THE COURT: Well what about going against the dealers?

23 MR. JAKUBOWSKI: Well, the problem with the dealers is
24 that first there's a lot of limitations with respect to that.
25 They may be able to do that anyway but it's not clear that --

1 but as Mr. Bressler stated, there are a lot of defenses that
2 dealers can raise that are a lot different than being able to
3 directly go against the successor under a theory of successor
4 liability. Which means it would put the purchaser in the shoes
5 of the old company whereas in the dealer case there are, in a
6 number of states as Mr. Bressler, I know, can talk about better
7 than I can, a lot of defenses. And as I understand it, it only
8 protects the purchaser; it may not protect the occupant or the
9 subsequent buyer in a further sale.

10 THE COURT: Um-hum. Go ahead, Mr. Jakubowski. I'll
11 have another question but I'll let you continue now at this
12 point.

13 MR. JAKUBOWSKI: Okay. In terms of -- just to, kind
14 of, reiterate the other point that I made and maybe to see
15 whether you have any questions on that, I do think that it is
16 important, given just the magnitude of this case and just the
17 exponential numbers involved here, to have this case put on a
18 parallel track with the Chrysler case.

19 This case does offer a distinguishing fact that I
20 pointed out in oral argument that was devolved in the record
21 and that you alluded to in your footnote 91 and that is that it
22 doesn't appear that there would be any change in the purchase
23 price or any diminution to the estate as a result of if the
24 Court were to impose successor liability on the purchaser
25 therefore it's effectively an immaterial change to the

1 contrary.

2 And I think that is a distinguishing feature of this
3 case and I think that in connection with the posture of the
4 case as it exists right now in the Second Circuit, I think it
5 would be helpful to have this case in front of it as it's
6 writing its opinion in Chrysler and as it's deciding this case
7 to be able to compare and contrast those two cases. As the
8 Supreme Court often does when it takes parallel cases, joins
9 them all together so that it can come up with a broader and
10 richer decision.

11 I guess this final point, Your Honor, is I don't think
12 that the notion that the debtors have raised that this is some
13 type of extraordinary relief is accurate. While it's
14 extraordinary in the sense that it's different, I don't think
15 there's anything in the legislative history that suggests that
16 it's an extraordinary measure that should be granted in very
17 limited circumstances, more in the nature of, like, a
18 preliminary injunction or even a TRO. It's not like that. I
19 think that if the statute -- statutory prerequisites are
20 satisfied, I think the language says that the Court shall do it
21 and I think the idea is that because of the fact that we're
22 dealing with a court, with a specialized court that has
23 tremendous knowledge, there's really no reason other than the
24 fact of the jurisdictional issues raised by Paragon (ph.) that
25 it has to go through an extra level. Whereas in no other

1 litigation, civil litigation, it does that.

2 So it seems to me that we had a true trial on the
3 merits; we have excellent advocacy, excellent proceedings and
4 there's no reason for that intermediate step to take place and
5 I don't think Congress expected it to be more in the nature of
6 a TRO-type proceeding.

7 With that, Your Honor, I will rest and I appreciate
8 your time.

9 THE COURT: Well thank you but I do have one last
10 question, Mr. Jakubowski, recognizing that every question
11 sometimes leads to another question. When the creditors'
12 committee filed its response today they noted something that
13 got my attention, that under rules in the Second Circuit when
14 they're trying to preserve the status quo in something that's
15 before them, that could result in a stay even without showing
16 the bases for a stay under applicable case law in the Second
17 Circuit and addressing the matter of the bond, which I'll be --
18 both of which I'll be asking Mr. D'Apice about in a couple of
19 minutes. Were you aware of that local court rule when you
20 asked me to certify it to the circuit?

21 MR. JAKUBOWSKI: I wasn't, Your Honor. But I will say
22 this, and I think that there are two issues, one is the
23 certification and the other is how quickly the Second Circuit
24 hears the appeal and whether it does it on an expedited basis
25 or not. My goal, as I said to you yesterday, was to try to get

1 this thing moved quickly enough, given the fact that the
2 parties have briefed the issue, it's a very narrow issue that
3 deals with just the successor liability issue.

4 THE COURT: I assume you're not expecting the circuit
5 to decide it in the next two days, before the purchaser's
6 allowed to close?

7 MR. JAKUBOWSKI: Well, I mean I supposed I could dream
8 but I think that -- I agree with you that it's unlikely.

9 THE COURT: If the circuit decided something in two
10 days, would you agree that it's not going to give the Supreme
11 Court much help in deciding the issue?

12 MR. JAKUBOWSKI: No, I think it would be very helpful
13 because I think what that would do at that point -- I mean I'm
14 in a way kind of assuming that the circuit will -- I think the
15 odds are that it would deny my motion, my argument and that
16 basically what it would do is to put the two cases on a
17 parallel track.

18 THE COURT: Well, I think you're -- I think it would
19 be hard-pressed to reverse on two days.

20 MR. JAKUBOWSKI: Right.

21 THE COURT: I don't quarrel with that notion but that
22 kind of hints, and I think I even used this expression in one
23 of my cases, doesn't that make the Second Circuit Court of
24 Appeals kind of a meaningless way station on the way to an
25 appeal?

1 MR. JAKUBOWSKI: Well, I think that that's really, at
2 the end of the day, for them to decide. And I have no problems
3 with having the argument laid out over a reasonable period of
4 time, and not two days at the appellate level, and I think that
5 we can still get the cases on a parallel track if the Supreme
6 Court wanted that. But that's why I say I think there are two
7 issues. The mootness issue, as had been widely quoted, I am
8 not -- I believe that relief can be granted notwithstanding
9 363(m) on the mootness. And that the decision and the closing
10 will not create equitable mootness as to this issue. I think
11 relief can be granted in this particular case under these facts
12 and will not be rendered equitably with the size of the closing
13 of the transaction.

14 So I'm not overly concerned about the fact that the
15 sale would close and the appellate proceedings would continue
16 because I think that those would be resolved in time for us to
17 get our surpetition filed and get the cases consolidated.

18 THE COURT: Okay. Thank you. Mr. D'Apice.

19 MR. D'APICE: Thank you, Your Honor. I join
20 Mr. Jakubowski's statement. I would only add, Your Honor, that
21 in terms of the public importance issues, we all know, I think,
22 that the bankruptcy world is watching this case as it watched
23 and watches the Chrysler case. And what we have happening here
24 in our view, Your Honor, is a use of 363 to accomplish what
25 these debtors or any debtor would not have been able to do

1 under a plan under 1141(d). They would not have been able to
2 do this transfer of substantially all of their assets, get a
3 plan and get a discharge, which is effectively what's happening
4 here. The operating entity, the operating assets are getting a
5 complete discharge from -- with an injunction from present
6 asbestos claims and tort claims.

7 They wouldn't have been able to accomplish this in
8 Chapter 7. Corporate debtors don't get the discharge. What
9 we've got in Chapter 7 -- and instead what we've done is use
10 363 in contravention of what -- 7 and 27 and 1141(d)(3) were
11 designed to prevent precisely what's happening here. It's to
12 transfer substantially all of the debtor's assets to a new
13 entity that for all intents and purposes it's the same company,
14 same office building and same company cars and same people and
15 the only difference is its liability, collective liability as
16 it winds down.

17 Add it to public importance, Your Honor, because this
18 case is being watched and will be cited and mechanisms will be
19 used and it will be used on an accelerated basis and if it's
20 not we're always facing the issue where -- where we're at now
21 the debtor says no, I have to close immediately or the world
22 comes to an end. .

23 THE COURT: Well pause on that, please, Mr. D'Apice.

24 MR. D'APICE: Yes, sir.

25 THE COURT: I take it you would agree, I'm sure

1 Mr. Richman would agree and I think I would agree that you've
2 still got to make Lionel findings, don't you?

3 MR. D'APICE: I believe that's right, Your Honor.

4 THE COURT: Well, that's kind of a decent safeguard,
5 isn't it?

6 MR. D'APICE: I'm not sure it adequately protects us,
7 Your Honor. I'm not sure that we can protect it with that --
8 with those kinds of -- I'm not sure that would protect our
9 client. If there's a injunction against bringing claims
10 against --

11 THE COURT: Okay. Did I interrupt you before you were
12 done, Mr. D'Apice?

13 MR. D'APICE: I only have one more point, Your Honor,
14 which is that the pending sale and purchase agreement provide a
15 termination right if the closing shall not have occurred on or
16 before August 15th or such later date that the parties may
17 agree in writing but no later than September 15th. I don't
18 know how quickly the Second Circuit will move. They moved very
19 quickly in the Chrysler case and this closing and the order
20 approving the closing has been entered so that term of the
21 purchase agreement has been met. And if they have until August
22 15 to close, and as late as September 15, that gives at least
23 some time for the appellate courts to set the conditions, Your
24 Honor, and operate it better.

25 THE COURT: Okay. Well, I did read your brief. Do

1 you have anything else you want to add, beyond what you already
2 told me just now?

3 MR. D'APICE: No, Your Honor.

4 THE COURT: Very well. Okay. Mr. Reinsel, I think at
5 some point you had a me too, but you didn't submit a brief.

6 MR. REINSEL: That's correct, Your Honor. We'll
7 simply join in the comments of the two movants.

8 THE COURT: Very well. Okay. Then I'll hear from the
9 opponents to the two motions or the motion and the alternative
10 request. Mr. Miller, are you going to be taking the lead on
11 that?

12 MR. MILLER: Yes, sir.

13 THE COURT: Go ahead, please.

14 MR. MILLER: If Your Honor please, by my count there
15 are approximately fifty-eight cases of argument that have been
16 filed in connection with the motions of the five tort claimants
17 and the group of asbestos claimants. And I'm absolutely
18 certain that the Court has carefully read all the papers and
19 the relevant portions of the United States Code and the Federal
20 Rules of Bankruptcy Procedure. Accordingly, I will be brief.

21 The objection to the motion demonstrated that the
22 movants have not established a basis for the certification of
23 their appeal to the United States Court of Appeals for the
24 Second Circuit. They have not satisfied the criteria stated in
25 Section 158(d)(2) of the Judicial Code to warrant this Court to

1 exercise its discretion to grant certification.

2 First, there is controlling positional law in the
3 circuit. It is a position of the Second Circuit in the
4 Chrysler case, irrespective of what Mr. Jakubowski
5 characterizes it to be. Two, resolution of parochial interest
6 as to the scope of Section 363(f) of the Bankruptcy Code does
7 not involve a matter of public importance. Three, there are no
8 conflicting decisions within this circuit that require
9 resolution. Four, certification will not materially advance
10 the progress of these cases. Therefore why has Mr. Jakubowski
11 made this motion a crusade of urgency?

12 The answer, I believe Your Honor, is somewhat obvious
13 and it is set forth in the objection of the committee, and Your
14 Honor referred to paragraph 19 of the objection of the official
15 committee. Mr. Jakubowski says that he was not aware of the
16 rule but the rule is there and if Your Honor grants
17 certification then this case has to move into status quo. That
18 is, effectively staying this case and the closing of this 363
19 transaction that is so essential to so many parties and as Your
20 Honor pointed out, if it doesn't close there is no alternative.

21 So a group of tort claimants and asbestos claimants
22 are prepared to see these actives go down in flames for the
23 possibility and the probability that there will be no recovery
24 for any general unsecured creditors and significant and
25 substantial loss to secured creditors.

1 Mr. Jakubowski has been candid with the Court and
2 other parties despite his public statements of -- let me
3 rephrase that, Your Honor. Mr. Jakubowski has stated publicly
4 that he does not want to stop the closing of the sale that may
5 occur this Thursday afternoon. Nevertheless, he is desirous
6 and has almost demanded that the certification take place
7 before 12 noon on Thursday so that the status quo rule can take
8 into effect and that will stop the closing.

9 I think this is a very well-conceived tactic and
10 avoids the requirement of seeking a stay and posting a
11 sufficient supersedeas bond.

12 The certification should be denied, Your Honor, for
13 all the reasons stated in the objection, which you will find
14 not responded to by the representatives of the asbestos claims.
15 And I submit to Your Honor, Mr. Jakubowski has not complied
16 with the standards set forth in Section 158(d)(2) to warrant
17 your exercise of discretion in this court. And as we pointed
18 out in our papers and in the papers which have been filed on
19 behalf of the Treasury and the official creditors' committee
20 and in light of the decision of the Second Circuit, this is not
21 an appropriate case for certification.

22 In connection with the asbestos claimants' alternative
23 request for relief, and that is a stay of Your Honor's order
24 pending an appeal to the District Court, there is no argument
25 in the motion that cites to any law of any significance.

1 Counsel for the asbestos claimants has done nothing on this
2 record or otherwise to satisfy the determinative factors for
3 the granting of a stay. And it is unequivocal and clear that
4 the granting of a stay pending appeal is an extraordinary
5 remedy.

6 The asbestos claimants cannot establish, one, a strong
7 showing of likelihood of success on the merits. Two,
8 irreparable injury to asbestos claimants after the stay. As
9 Your Honor inserted into the sale order, there are
10 constitutional limitations that they can pursue to the extent
11 permitted by the constitution. And they may continue to
12 prosecute notwithstanding the consummation of the transaction
13 as they are doing in the Chrysler case.

14 Three, there is -- they are unable to establish a lack
15 of substantial harm and injury to the debtors and all of these
16 other economic stakeholders in these proceedings. Four, the
17 public interest supports the consummation of this transaction
18 and they have established nothing to the contrary.

19 Counsel made an argument that this is a real stay here
20 that it's the same General Motors, the same building, same
21 place, etcetera. I would note, Your Honor, that in the Second
22 Circuit argument from the Chrysler case, Mr. Esserman,
23 representing defendant's claimants again, clearly said it in
24 the argument to the panel by saying that Chrysler will look
25 just like Old Chrysler: they're going to sell the same cars,

1 they are the same employees, same management; the same argument
2 that's being made here, Your Honor, and that's page 26 of the
3 transcript.

4 The asbestos claimants and the tort claimants, to use
5 the vernacular, Your Honor, don't have any skin in the game
6 compared to what that -- that is held by all other parties and
7 all of the economic stakeholders who will be catastrophically
8 injured if the 363 transaction does not close as scheduled.

9 The record is replete with the extreme and dire
10 consequences that would occur if the debtor's business and
11 assets have to be liquidated. Liquidation will be the result
12 if the Treasury determines that the sale order is not in full
13 force and effect under the amended DIP financing agreement.

14 The Court has found and determined that there is no
15 alternative to the 363 transaction toward liquidation in a
16 result that is too devastating to consider. Yet, movants ask
17 that their parochial interested be exalted over the extensive
18 and considered findings and conclusions that the Court made in
19 the July 5 decision and order.

20 The papers submitted in opposition to the motion are
21 comprehensive and demonstrate the total lack of propriety and
22 substance of the motion.

23 Excuse me just one moment, Your Honor.

24 THE COURT: Sure.

25 MR. MILLER: Mr. Jakubowski stated, I believe a little

1 earlier, that he has no objection to the Court of Appeals or
2 any appellate court laying out the schedule for the submission
3 of briefs and setting a time for argument, etcetera, and that
4 he would not oppose the consummation of the sale.

5 If that is all accurate, Your Honor, what is the great
6 haste in proceeding with these motions at this time? If his
7 rights are all reserved, as he thinks they are, and he is
8 prepared for a normal process of pursuing an appeal, why all
9 this undue haste and requiring people to work all night?
10 Unless he is absolutely interested in getting the certification
11 done and up to the Court of Appeals to take advantage of the
12 status quo stay; a status quo stay which will frustrate
13 everything that happened last week.

14 In respect of the arguments which have been made by
15 Mr. Jakubowski and the asbestos claimants, Your Honor, the
16 objections are quite comprehensive and I would rest on the
17 papers and not prolong this argument.

18 If Your Honor were inclined to grant the stay, we have
19 submitted the affidavit of Mr. Stephen Worth of Evercore Group
20 LLC and to the probable scope and extent of a supersedeas bond
21 that would be required in this case. Mr. Worth has determined
22 that the potential harm to these debtors' estates and the
23 economic stakeholders would range in the area of eighty billion
24 dollars.

25 Mr. Michael Eisenband of FTI has submitted an

1 affidavit which has been submitted by the official committee
2 that has a range, as I recall it, in the area of thirty to
3 forty billion dollars or someplace in that range. Again, a
4 very astronomical sum.

5 The United States Treasury has suggested a bonding in
6 the area of the value of the ten percent interest which would
7 go to the debtors if this sale were consummated, having a range
8 of 7.4 billion dollars to nine plus billion dollars. That
9 range of damages is extraordinary. And to allow the status quo
10 stay to take effect or to grant a stay would result in
11 irreparable damages to the debtors and the economic
12 stakeholders in this case. This is not a conclusion that
13 should be allowed and endanger all of the interests of the
14 folks that are involved in these cases.

15 We would submit, Your Honor, on behalf of the debtors,
16 that the motions for certification should be denied and the
17 asbestos claimants' motion for a stay pending appeal to the
18 District Court likewise should be denied for failure to
19 demonstrate any of the problems of the four-prong test, all of
20 which must be satisfied for the granting of the extraordinary
21 remedy of the stay pending appeal.

22 Thank you, Your Honor.

23 THE COURT: All right. Thank you. U.S. Attorney's
24 office for the government want to be heard now? Mr. Schwartz?

25 MR. SCHWARTZ: Matthew Schwartz for the United States.

1 I really don't have much to add to Mr. Miller's comprehensive
2 presentation in opposition to the motions. I think, with
3 respect to Mr. Jakubowski's part of the motion, he was quite
4 candid about why he's seeking certification. He's seeking
5 certification not because there's unsettled law in this circuit
6 and not because bypassing the District Court will promote
7 efficiency in this case, but because he's trying to have this
8 case tracked with the Chrysler case when it gets reviewed
9 before the Supreme Court, and that's fine. Bu that's not any
10 of the prongs of 28 U.S.C. 158(d)(2). He makes, I think, a
11 good argument as to the difference between a decision and an
12 order or whatever the appropriate language is. But the fact is
13 that Your Honor found in your sale opinion that the bottom line
14 holding of Chrysler on successor liability is the law of this
15 circuit. So there is clear and controlling law on the bottom
16 line holding in that respect.

17 For the same reason, because that issue is well
18 decided, that discrete issue can no longer be considered, in
19 the context of this case, an issue of public import.

20 And finally, with respect to the third prong, case
21 efficiency, the Second Circuit in Weber said that prong comes
22 into play when a prompted determinative ruling might avoid
23 needless litigation. Again, we already have a determinative
24 ruling on this issue from the circuit in Chrysler. So there
25 should be no certification to the Second Circuit.

1 Going then to the stay argument, if the whole point of
2 this exercise is to preserve the successor liability issue for
3 Supreme Court review then your focus on the stay inquiry should
4 be on the irreparable harm to the movants. If it's true, as
5 Mr. Jakubowski says, that closing the transaction doesn't moot
6 this issue, then there is no irreparable harm to the movants in
7 the absence of a stay.

8 If, on the other hand, they need a stay in order to
9 preserve this issue for Supreme Court review, then what the
10 movants are really asking for is an open-ended stay that goes
11 all the way through a Supreme Court merits decision. The
12 undisputed evidence at the evidentiary hearing before Your
13 Honor was that every day that General Motors remains in
14 bankruptcy it erodes the value of the enterprise. We're
15 talking now to next year's term of the Supreme Court, a long
16 period of time. And during that period of time the value of
17 General Motors will totally disappear. We're talking about the
18 liquidation scenarios that you heard so much testimony about.

19 So irreparable harm in that case, even if their issue
20 of law would be mooted absent a stay, needs to be weighed
21 against the devastating harm to the other parties in interest
22 to this case: the stakeholders of the debtors' estates, the
23 government, the employees of General Motors, its suppliers and
24 their employees, the communities where General Motors
25 dealerships reside; all of them will be devastated in that

1 scenario.

2 The other stay factors, for the reasons described by
3 Mr. Miller, also don't come into play. So a stay is simply not
4 appropriate in this case.

5 And then finally, if Your Honor were to decide
6 otherwise, for the reasons Mr. Miller gave a significant bond
7 that will protect all of those constituents against the harms
8 attendant with a stay needs to be posted by the appellants.
9 The number that we gave in our brief, the 7.4 billion dollar
10 number, was the absolute minimum number for an acceptable bond.
11 That is the bottom of the range of the number proffered by
12 Evercore on the loss solely to the unsecured creditors. That
13 doesn't say anything to the loss to New General Motors, doesn't
14 say anything about the loss to the secured creditors, my client
15 and its Canadian lenders; that's the absolute minimum number.

16 For those reasons, the application should be denied.

17 THE COURT: All right. Thank you, Mr. Schwartz.

18 Mr. Mayer, would you like to be heard?

19 MR. MAYER: Yes, Your Honor. I just have a short
20 piece of logic shopping which I think might be the determinant
21 and it takes off of an observation that Your Honor made at the
22 beginning of this call. There are only two possibilities. One
23 is the lien, the Second Circuit's order in Chrysler is
24 determinative and the other is --

25 THE COURT: Wait. Mr. Mayer, I couldn't hear you on

1 that.

2 MR. MAYER: There are only two possibilities. One is
3 that the Second Circuit's order in Chrysler is determinative
4 and controlling and the other is that it is distinguishable.
5 In the first instance the appellants seek direct review to
6 persuade the Second Circuit that it's wrong and 158 doesn't
7 cover that.

8 And in the other instance, the appellants seek to get
9 to the Second Circuit to state that that decision doesn't cover
10 their facts and 158 doesn't cover that either. That, to me,
11 covers the universe of possible outcomes. And in neither
12 situation is there any grounds for using 158 to get up to the
13 Second Circuit right away.

14 And further than that, I would rest on my papers.

15 THE COURT: Okay. Anybody else in opposition who I
16 haven't given a chance to be heard? Mr. Schein?

17 MR. SCHEIN: Yes, Your Honor. Very briefly.

18 THE COURT: Sure.

19 MR. SCHEIN: Your Honor, Michael Schein, Vedder Price
20 on behalf of Export Development Canada on behalf of the
21 governments of Ontario and Canada.

22 As a material stakeholder in this case, Your Honor,
23 EDC supports the debtors, the Treasury and the committee that
24 the movant's papers and relief sought should be denied and we
25 request that that really be denied based on the record before

1 this Court and the papers filed.

2 That's all, Your Honor.

3 THE COURT: Okay. Thank you. All right.

4 Mr. Jakubowski, reply.

5 MR. JAKUBOWSKI: I think I have three points, Your
6 Honor. First, I guess I stand on the linguistic's
7 interpretation of the statute. He talks about a decision, not
8 about an order or a bottom line ruling and to the extent that
9 your own words have any plain meaning to them, I think there is
10 a decision -- a difference between a decision and an order and
11 we don't really know what the rationale is even if we know what
12 the bottom line is and the bottom line, in, fact, to these
13 facts, may be different. So we don't know that there is a
14 controlling determination yet because we don't really know what
15 the rationale is for the decision.

16 Secondly, with respect to Local Rule 27(b), which I
17 have pulled up, I don't think that that would apply here and I
18 would urge the Court to please take a look at 27(b). It
19 appears to -- it certainly doesn't sanction any type of a
20 limitless stay and it only says upon appropriate showing of
21 urgency the clerk may set any motion for a hearing on any day
22 the court is in session. When the clerk thus set the hearing
23 for a time not later than twenty-four hours after application
24 to the clerk during the period Monday to Thursday or for
25 Tuesday morning through the period after Thursday, the clerk

1 may endorse -- may endorse, on the motion papers a direction
2 that the parties will be expected to maintain in the status
3 quo.

4 That is not an open-ended status quo, nor is it
5 something that, after our discussion on the record, is
6 something that I would anticipate, at least from my
7 perspective, pursuant. But I do think that it is important to
8 get this issue in front of the appellate court quickly so that
9 it can consider the issues in connection with existing opinion
10 and bypass the need for an unnecessary appellant review.

11 And finally, Your Honor, I do think, again, that with
12 respect to the legislative history, it certainly does authorize
13 this type of issue, the type of issue to be certified and sent
14 on for appellate review. And I, again, would urge you, on the
15 basis of the extreme need of my client and the thousands of
16 people that are in their situation, to give them that extra
17 year that they need in order to be able to get a final
18 resolution on their payments.

19 THE COURT: Okay. Thank you. Mr. D'Apice?

20 MR. D'APICE: Thank you, Your Honor. Briefly I think
21 that for the standards of 158(d)(2), just to reiterate my
22 argument earlier that in case that appeal does involve matters
23 of public importance and we saw how quickly the appellate court
24 acted in Chrysler and there's no guarantee that they would act
25 as quickly in this case but I would -- I have every expectation

1 that they would.

2 I think with that being the standards of 158(d)(2) and
3 also we believe that if any bond -- our clients are tort
4 claimants, any bond would effectively be subject to -- other
5 than the nominal bond.

6 THE COURT: I couldn't hear you, Mr. D'Apice.

7 MR. D'APICE: I'm sorry, Your Honor. Anything
8 other -- as far as the bond is concerned, our clients are
9 clearly tort claimants; they're working people. They would not
10 be able to post anything other than a strictly nominal bond and
11 of a very limited amount. And in fact I would urge that the
12 bond is discretionary with Your Honor that no bond be required
13 in this case, particularly since under the terms of the --
14 purchase agreement closing can occur as late as August 15th and
15 even September 15th as a part of decree.

16 So I think we've met the standard of 158(d)(2) with
17 the matter of public importance and the --.

18 THE COURT: All right. Okay. Folks, I'm going to
19 take a recess and I'm going to give you a ruling tonight. For
20 those who are on the phone, I would ask that you keep your
21 lines open and you can walk around either in your offices or
22 down the hallway but that you be back by 8:10.

23 For those in the courtroom, I'm going to make the same
24 request. I can't guarantee that I'll have a ruling for you by
25 that time but I'm going to try. So we're in recess. Thank

1 you.

2 (Recess from 7:53 p.m. until 8:30 p.m.)

3 THE COURT: Good evening. I'm sorry to keep you all
4 waiting.

5 Folks, I'm going to be denying both motions but it
6 would take too long for me to dictate all of the reasons and
7 I'd get too hoarse. I also learned in this case that I can't
8 count on transcript being available that quickly. And if there
9 are any further proceedings in this case before the closing,
10 such as a request up the street for another try to stay, I
11 think people should know my reasons with some clarity and
12 detail.

13 So for that reason I'm going to file a bench decision
14 in the next couple of hours, posting it on ECF, our electronic
15 court filing system, for all of you to have available, which
16 sets forth in detail the reasons for these two decisions, one
17 being the denial of certification to the circuit and the second
18 being the denial of a stay, the alternative relief that Mr.
19 D'Apice had requested.

20 That bench decision will also contain an order, a
21 formal order, denying the relief for those who feel aggrieved
22 by the decision to work with as they see fit.

23 At this point I would suggest that people who are
24 interested in the details not wait around in the courthouse if
25 you have the ability to get ECF wherever you might be.

1 We're adjourned. Have a good evening.

2 MR. JAKUBOWSKI: Your Honor, may I just ask you
3 something please or make a comment?

4 THE COURT: Is this Mr. Jakubowski?

5 MR. JAKUBOWSKI: Yes it is, Your Honor.

6 THE COURT: Yes.

7 MR. JAKUBOWSKI: I personally have no intention of
8 running up the street or down the street or across the street.
9 And I don't know about my -- the other movants but there
10 certainly is, from at least my perspective, no particular need
11 for you to stay late.

12 THE COURT: Well, I'm grateful for that, Mr.
13 Jakubowski, but I think I owe it to the public to get my work
14 done.

15 MR. JAKUBOWSKI: Okay.

16 THE COURT: Thank you. Have a good evening,
17 everybody. We're adjourned.

18 (Proceedings concluded at 8:33 p.m.)

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C E R T I F I C A T I O N

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3 I, Pnina Eilberg, certify that the foregoing transcript is a
4 true and accurate record of the proceedings.

5

6

7 Pnina Eilberg

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